IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 100 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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GANESH LALSING BUDHA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 100 of 2002
MR DEEPAK M SHAH for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 25/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.R.VORA)

1. By way of filing this Appeal the original accused Ganesh Lalsing Budha of Sessions Case No.5/2001 has challenged his conviction awarded by Sessions Judge, Rajkot on 3rd January, 2002 for the offences proved against him, punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act').

2. On 14th March, 2001, Digvijaysinh Mahendrasinh Vaghela, Police Inspector of Pradhyuman Nagar Police Station received information through Police Constable Mahavirsinh Mahendrasinh that a person appearing to be 'Gurkha' aged about 20 years wearing blue coloured T-shirt and a pant of the same colour was likely to deliver narcotic substance to some other unknown person near Amrapali Railway Crossing about 19:00 hours on that day. Police Inspector Digvijaysinh reduced the information in writing and made entry in station diary. He also immediately sent report in this respect to the Commissioner of Police, Rajkot for arranging raid. Two panchas were selected and were called at the police station. They were made aware about the information received, and after preparing preliminary panchnama, police party including two panchas proceeded to Amrapali Railway Crossing in a police vehicle. After reaching near Amrapali Railway Crossing, at about 19:50 hours they noticed that a person wearing blue coloured T-shirt and a pant of the same colour carrying a bag in his hand came from the side of Amrapali Theatre and stood near the Railway Crossing awaiting for some other person to come. This person was revealed to be accused no.1 appellant Ganesh Lalsing Budha Nepali. Thereafter, one person came near Amrapali Railway Crossing on Hero Honda Motorcycle and parked his motorcycle near Ganesh. Both of them had some conversation. At that very juncture police officials and panchas reached near them and apprehended both of them. The other person was revealed to be one Mayur Ashokbhai Faldu accused no.2 in the above said sessions case. Both the persons were explained about their statutory right to be searched in presence of gazetted officer or magistrate, but both of them consented to be searched in presence of one Mr.NK Gohil, A.C.P. who was requested by the complainant to remain present at the place of raid. Mr.NK Gohil was gazetted officer. The personal search of accused was carried in presence of panch witnesses and in the presence of Mr.NK Gohil, A.C.P. The bag which was carried by accused no.1, present appellant, was opened by Mr.NK Gohil. On opening

of the bag it was found that some substance smelling like 'charas' was packed in all 8 small plastic bags. PW2 Mukesh Mayaram was called by the police, who weighed the substance and found that the same was weighing 5 kgs. and 250 gms. None of the accused offered any explanation for the possession of the said substance. Panchnama which is at Ex.13 was drawn in presence of panch witnesses. The 'charas' was seized by the police. Samples were taken for analysis by the Forensic Science Laboratory (hereinafter referred to as 'the FSL'), and thereafter Digvijaysinh Mahendrasinh Vaghela, PSI, Pradhyuman Nagar Police Station lodged FIR which is on record at Ex.19. The muddamal 'charas' seized by Digvijaysinh Vaghela was handed over to PW5 Gokulbhai Vasantbhai, Muddamal Writer Head, Praduman Nagar Police Station, Rajkot, who in turn sent this muddamal to the FSL through PW7, Vijaybhai Raghubhai, Police Head Constable. PSI Dharemendrasinh Jhala examined as PW9 was entrusted with the investigation of the case. After due investigation a charge-sheet came to be filed against both the accused including the present appellant for the offences committed by them under Sections 20, 21 and 29 of the NDPS Act. Both the accused pleaded not guilty.

3. Prosecution examined in all ten witnesses and submitted as many as eighteen documents. Thereafter, the statements of both the accused were recorded and prosecution as well as defence were heard. The learned Sessions Judge, Rajkot, vide his judgment and order dated 3rd January, 2002 came to the conclusion that accused no.2 Mayur Ashokbhai Faldu was required to be acquitted of the charges levelled against him because the prosecution failed to prove conscious possession of the muddamal 'charas' of the said accused. Whereas, the learned Sessions Judge convicted the present appellant original accused no.1 for the offences proved against him and punishable under Section 21 of the NDPS Act. The present appellant was sentenced to suffer RI for a period of 10 years with a fine of Rs.1 lakh and in default to suffer further RI for one year. Being aggrieved, original accused no.1 has filed this Appeal.

4. Learned advocate Mr.DM Shah for the appellant was heard at length at the admission stage.

5. We have extensively travelled through the evidence from record available with us. We have carefully scrutinized the evidence on which our attention is drawn. It appears that a contention which was raised before the Sessions Judge is also raised in this Appeal as to whether the substance seized is a 'charas' within

the scope of definition of 'charas' as envisaged under Section 2 of the NDPS Act. Taking into consideration the report of the FSL Ex.47, it clearly denotes that the substance was cannabis plant and leaves no doubt in any manner as to the substance being contraband article as per Section 2 of the NDPS Act. It is amply established by the evidence of the prosecution that PW1 Digvijaysinh Vaghela Ex.9 had handed over the muddamal to PW5 Gokulbhai Vasantbhai Ex.34 on 14th March, 2001, who was Muddamal Writer Head of concerned Police Station. It is also established that the said muddamal received by PW5 Gokulbhai Vasantbhai on 17th March, 2001 was handed over to PW7 Vijaybhai Raghubhai for transmitting the same to the FSL at Ahmedabad. It is also established that PW7 Vijaybhai Raghubhai Ex.41 received the muddamal article in sealed condition which was sealed as "Police Inspector, Rajkot City". In all eight samples were sent to the FSL, and after analysis, in the opinion of Scientific Officers of the said Laboratory the substance was identified as cannabis plant (i.e. known as 'charas'). Therefore, the trial Judge rightly came to the conclusion that the substance which was found was 'charas' within the meaning of Section 2 of the NDPS Act and that the prosecution had established that the said substance was seized from the appellant and was duly sent to the FSL. We do not accept the argument advanced on this score.

6. It was then argued that Section 42 and Section 50 of the NDPS Act were not duly complied with. But, on reappreciating the evidence it is clear that the information received by PW1 Digvijaysinh was reduced in writing and the said entry made in the police station diary is produced at Ex.10. The information sent to the Deputy Commissioner of Police by PW1 is also produced at Ex.11. Evaluating these two documents with the oral testimony of PW1 and other witnesses, it transpires clearly that the mandatory provisions of Section 42 of the NDPS Act were fully complied with as well as Section 50 also was complied with, which is evident from panchnama Ex.25 and from the evidence of panch PW4 Mahavirsinh Mahendrasinh Ex.33. It is proved that accused were explained about their right to be searched in presence of gazetted officer or Magistrate. It is proved that both the accused consented to be searched before Mr.NK Gohil, A.C.P. present at that place.

7. Irrespective of the compliance of Sections 42 and 50 of the NDPS Act on fact it is proved that the raid was carried on public place near Amrapali Railway Crossing. In this view of the matter, Sections 42 and 50 of the

NDPS Act will have no application at all to the facts of the present case for the simple reason that the raid was carried on public place and hence was conducted as per Section 43 of the NDPS Act, wherein the mandatory provisions of Section 42 of the NDPS Act are not required to be followed. The search conducted was not personal search inasmuch as the substance was found from the bag carried by the appellant. Therefore, compliance of Section 50 also was not necessary.

8. Reappreciating again the evidence of the prosecution side, vide evidence of PW1 Ex.9 Digvijaysinh Mahendrasinh Vaghela prosecution was able to prove that on receiving the information, raiding party, in his leadership, went to Amrapali Railway Crossing and both the accused were found from there. Present appellant no.1 was carrying a bag and 'charas' was recovered from the said bag. It is proved through the evidence of panch withness PW4 Mahavirsinh Mahendrasinh Ex.33 and panchnama Ex.15 that panchas were present while the 'charas' was found from the bag carried by the present appellant and it is also proved that the said muddamal was properly sealed and transmitted to the FSL in proper sealed condition. PW4 Mahavirsinh has supported the panchnama Ex.15. He also supports the say of PW1 Digvijaysinh. The evidence of the complainant is again corroborated by panchnama Ex.15 and complaint Ex.19. PW2 Mukeshbhai Mayaram Goplani is a witness examined by the prosecution who was called by the police for weighing the 'charas' found from the possession of the present appellant. In all respect this witness PW2 Ex.27 has supported the case of the prosecution. PW3 Mansukhbhai Ranchhodbhai Ex.28 panch of panchnama Ex.15 has not supported the prosecution case, but PW4 Ex.33 Mahavirsinh Mahendrasinh, the other panch of Ex.15 panchnama has in all respect supported the prosecution case and PW1. From the evidence of PW1 Digvijaysinh and PW4 Mahavirsinh, panchnama Ex.15 is proved beyond reasonable doubt denoting that the 'charas' was found from the bag carried by the accused no.1 present appellant. PW5 Gokulbhai Vasantbhai, Writer Constable to whom the muddamal was entrusted deposed that he had received the muddamal in a sealed condition. PW8 Hiralal Govindbhai Ex.44 who was PSO, Pradhyuman Nagar Police Station confirms the entry Ex.43 in respect of muddamal. PW7 Ex.41 Vijaykumar is a Police Constable of Pradhyuman Nagar Police Station who received the muddamal on 17th March, 2001 for onward transmission to the FSL and he has deposed that he had handed over the muddamal in a sealed condition to the FSL on 18th March, 2001. Dharmendrasinh Jhala PW9 Ex.45 at the relevant time was PSI of Pradhyuman Nagar Police

Station and was the member of the Raiding Party. In all respect he corroborates the evidence of PW1 Digvijaysinh in respect of the raid carried out and the seizure of muddamal 'charas' from the present appellant. The prosecution has also examined Kiritsinh Punjaji Jadeja PW10 Ex.49 the Second Investigating Officer of the case.

9. While we reappreciate and scan the evidence on record on factual aspects we are convinced by the evidence of PW1 Digvijaysinh Mahendrasinh, PW4 Mahavirsinh Mahendrasinh and other evidence of the members of the Raiding Party that the present appellant was found in possession of contraband 'charas' which he carried in a bag in his hand. The case of the prosecution through the above witnesses is found thoroughly consistent and that the defence could not point out any discrepancy or even minor contradiction in a prosecution case, let alone contradiction going to the root of the case. We find no reason, therefore, to disbelieve the evidence of the prosecution. The trial Judge rightly, therefore, convicted the original accused no.1 present appellant herein for the charge levelled against him under Section 21 of the NDPS Act.

10. In the result, we do not find any reason to interfere with the impugned judgment. The Appeal, therefore, stands dismissed.

(Y.B. Bhatt, J.)

(J.R. Vora, J.)

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